92-810

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

versus

UNITED MARKETS INTERNATIONAL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November 1992

QUESTIONS PRESENTED

1. Does the involuntary bankruptcy statute, 11 U.S.C. § 303, unconstitutionally violate the "due process," "taking," and "liberty" provisions of the 5th Amendment by the arbitrary and capricious deprivation of a parties "non-debtor" status, and all property rights and protected liberties related thereto, through the mere filing of a pleading before an Article I court?

2. Does 11 U.S.C. § 303 unconstitutionally permit Congress to withdraw jurisdiction over suits at common law from Article III courts by merely labeling such suits where legal rights are to be determined as "Involuntary Bankruptcy" petitions, thereby conferring exclusive jurisdiction over such actions at law upon Article I bankruptcy courts?

3. Is 11 U.S.C. § 303 unconstitutionally void for vagueness?

4. Do alleged "creditors" constitute a protected class entitled to avail themselves of the bankruptcy courts as a matter of "public right?"

5. Does the failure of a bankruptcy court to hold a trial on a timely controverted involuntary bankruptcy petition, instead relying on an unverified agreed order entered without express written authority and refusing to consider disputed substantive issues, constitute a denial of due process rendering its order for relief void?

6. May bankruptcy courts arbitrarily and unilaterally abrogate, ignore and nullify Bankruptcy Rule 1008, a duly enacted federal statute requiring verification of pleadings and amendments thereto in bankruptcy proceedings, and

likewise arbitrarily and unilaterally abrogate, ignore and nullify state substantive law requiring that a client grant express written authority to an attorney in order for that attorney to compromise its claims and defenses, less the offending document be void?

In accordance with Supreme Court Rule 14(b), Petitioner states that the following individuals and entities were original parties in the case under review and even though no party other than Trustee W. Steve Smith for United Markets International, Inc. made an appearance in the Court of Appeals below, each may have an interest in the outcome of this case:

W. Steve Smith, Trustee of United Markets International, Inc.

Essam Obaid

Obaid and Almulla Construction Co., Ltd.

Vasco Equipment Company

Alltransport Incorporated

Rex Supply Company

Kewaunee Scientific Equipment Co.

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IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
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R. DAVID LEGG,
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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The order of the Bankruptcy Court below dismissing Petitioner's motion pursuant to Federal Rule of Civil Procedure 60(b) is reproduced in the appendix at page C-1, and said court's order denying reconsideration is reproduced in the appendix at page E-1. The Order for Relief is at appendix G-1. The Order of the District Court

below affirming the Bankruptcy Court is reproduced in the appendix at page D-1, and said court's Order denying reconsideration is reproduced in the appendix at page F-1. The Opinion of the panel of the Fifth Circuit, ruling on the merits of the Rule 60(b) motion and addressing the issues concerning the constitutionality of 11 U.S.C. § 303, is reproduced in the appendix at page A-1. Said panel's denial of Petitioner's Petition for Panel Rehearing is reproduced in the appendix at page B-1.

JURISDICTION

Bankruptcy Main Case No. 85-00872-H2-5 was commenced by the filing of an Involuntary Petition on February 7, 1985, pursuant to 11 U.S.C § 303. An Order for Relief was signed on March 28, 1985.

Petitioner Legg's Motion to Set Aside Void Order Pursuant to Rule 60(b) Fed.R.Civ.P. was filed October 23, 1989, before the bankruptcy court below. The bankruptcy court's order denying the motion without hearing was entered December 15, 1989. I egg's timely filed his Motion for Reconsideration on December 29, 1989, the denial of which was entered on January 29, 1990. Legg timely filed his Notice of Appeal under 28 U.S.C. § 158 on February 9, 1990.

The district court's Order affirming the bankruptcy court was filed on October 4, 1990. Legg timely motioned for reconsideration on October 18, 1990, the order of the district court denying which was entered March 15, 1991. Legg timely filed his Notice of Appeal to the Fifth Circuit on April 15, 1991 pursuant to 28 U.S.C § 158(d) and/or 28 U.S.C. 1291.

The Fifth Circuit's Opinion was entered on June 30,

1992. Legg timely motioned for an extension of time until July 28, 1992 to file his Petition for Rehearing which was granted for good cause on July 8, 1992. The Petition for Panel Rehearing was timely filed within said extension on July 27, 1992, and the Fifth Circuit denied said Petition on August 10, 1992. This petition has been timely filed within ninety (90) days of the denial of Legg's Petition for Rehearing.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant provisions of Article I and Article III of the Constitution of the United States, and the Fifth Amendment thereto, are reproduced in the appendix at page I-1 through I-3.

The relevant provisions of Title 11 and Title 28 of the United States Code governing Bankruptcy pertinent hereto, 11 U.S.C. § 101, 11 U.S.C. § 303, 28 U.S.C § 157 and 28 U.S.C. § 1334, are reproduced in the appendix at pages I-3, I-4, I-8 and I-9, respectively.

The relevant provisions of Fed.R.Civ.P. 60(b) and Bankruptcy Rule 1008 appendix at pages I-10 and I-11, respectively.

CONSTITUTIONALITY OF ACT OF CONGRESS

This case calls into question the constitutionality of an Act of Congress and 28 U.S.C. § 2403(a) may be applicable. On September, 25, 1991, pursuant to FRAP 44 and 28 U.S.C. § 2403(a), the Clerk of the United States Court of Appeals for the Fifth Circuit certified to the Attorney General the fact that the constitutionality of an Act of Congress has been drawn into question. The

Attorney General elected not to file a brief in this matter and stated that said office was of the opinion that the Fifth Circuit would decide the case below without reaching the constitutional questions presented. Such was not the case, as the Fifth Circuit did reach said issues in its opinion.

STATEMENT OF THE CASE

United Markets International, Inc. (UMI) is a Texas corporation, wholly owned by petitioner R. David Legg (Legg). On February 7, 1985, a Chapter 11 involuntary bankruptcy petition was filed pursuant to 11 U.S.C. § 303 against UMI by Essam Obaid (Obaid), a Saudi Arabian national, and the Obaid and Almulla Construction Co., Ltd. (OBALCO), a Saudi Arabian joint venture company. The involuntary bankruptcy petition alleged a breach of a contract in force on the date of filing between UMI and OBALCO, and sought damages for same. Obaid, president and co-owner of OBALCO, further alleged the existence, and breach of an agency contract between UMI and himself, as Saudi Arabian agent for UMI, and further alleged a cause of action for monies had and received. The combined claims of Obaid and OBALCO exceeded Two Million Dollars. UMI, through retained bankruptcy counsel, David Unger (Unger), timely filed an answer denying indebtedness and controverting all claims.

Obaid and OBALCO sought and obtained the appointment of an interim trustee pending trial on the controverted involuntary bankruptcy petition. Trial was scheduled for March 28, 1985.

On March 27, 1985, four alleged creditors, solicited by Obaid and OBALCO, joined in the original petition. The claims of these alleged joining creditors were at the time no more than current accounts payable, minuscule

compared with those of Obaid and OBALCO, *not* past due, and at least one of said alleged creditors had been paid. Each of these joining alleged creditors pled breach of the contract between UMI and OBALCO (to which none were parties) as part of the basis for their respective claims. Thereafter, only *one* of these joining alleged creditors filed a Proof of Claim in this proceeding; said claim was approximately one-third the amount claimed in its joinder, and same was invoiced only seven days prior to the involuntary filing.

No trial was held on the controverted involuntary bankruptcy petition. Instead, counsel for Obaid and OBALCO offered the bankruptcy court an agreed order, allegedly signed by UMI's counsel Unger, submitting to the entry of an order for relief and the continued appointment of the interim trustee. *See* Appendix H-1. The agreed order contained no verification as required by Bankruptcy Rule 1008, and was executed without the knowledge or express written approval of Petitioner Legg, the President and sole shareholder of the alleged debtor UMI. At no time then or subsequently did UMI's bankruptcy counsel inform Legg of his action or its effect. Legg was not served a copy, nor was he informed of the entry or the effect of the order for relief, a term of art unique to the field of bankruptcy.

In addition to bankruptcy counsel, Legg had retained counsel to represent him personally in the matter, though he had not been served with process nor made a party to the proceeding. Legg's personal counsel appeared at the appointed time and place to represent his client at the trial on the controverted involuntary petition, only to find a notice posted on the door of the bankruptcy court that the trial had been "passed or waived." He so informed Legg, and both anticipated a resetting of the trial.

Legg was immediately and acutely aware of the bankruptcy proceedings and their effect on his business, and upon his personal life. On the very day of the filing of the involuntary petition, long before the alleged debtor UMI was even served with process, its bank accounts were seized and closed when the petitioning alleged creditors' counsel informed UMI's bank officers of their action in bankruptcy court. At the same time, said bank released, and OBALCO removed, over 1.2 Million Dollars from a special deposit joint account UMI had maintained with OBALCO for performance under its contract. An irrevocable letter of credit, to which UMI was the sole beneficiary, and which contained over 2.7 Million Dollars in available funds was unilaterally cancelled. Moreover, the trustee had "secured" all company records while interim trustee, before the entry of the order for relief, and had locked Legg out of his offices, seizing all assets. Immediately after his appointment, the trustee initiated a cause of action against Legg alleging his homestead to have been obtained as a fraudulent conveyance.

His bankruptcy counsel, having first deceived him, now deserted him, leaving Legg to wander alone in the esoteric and uncharted field of bankruptcy administration. Shortly after the initiation of the bankruptcy proceedings, Legg filed an action in bankruptcy court alleging the claims of Obaid and OBALCO to be fraudulent. The trustee claimed this action to be property of the estate, sought and obtained its dismissal. Legg's personal counsel immediately thereafter attempted to bring contractual and tortious claims against Obaid and OBALCO in U.S. district court. These too were deemed property of the estate and dismissed. Legg-not his counsel- was sanctioned for this effort. Legg sought dismissal of the bankruptcy action before the bankruptcy court; his effort was dismissed without hearing and without notice to him. In 1986, he

sought removal of the trustee pointing out his refusal to investigate the disputed creditors' claims, and a ruling on said motions was not issued until two and one-half years later, in 1989. In early 1987, Legg attempted to bring a malpractice action in state court against the bankruptcy attorneys who had compromised this case without his knowledge. Upon the intercession of the trustee, who again claimed this action as property of the estate, this cause was dismissed. A contemporaneously filed action in state court against UMI's bank met a similar fate.

The trustee's action alleging Legg's homestead to have been a fraudulent conveyance proceeded to trial, with the result that it was seized, and Legg was evicted from his home. Appeals were dismissed as "moot," as the property was disposed of before appellate review was had.

Throughout all the above, the claims of the original petitioning creditors, Obaid and OBALCO, remained disputed. In fact, an action belatedly and halfheartedly brought by the trustee, objecting to the claims of Obaid and OBALCO remains pending to this date. Virtually no other pre-petition creditors would join in this involuntary proceeding. No creditors appeared at the only creditors' meeting ever held in this case, and said meeting was not held by the trustee until over three and one half *years* after the entry of the order for relief.

Still, Legg refused to accept the validity of the bankruptcy court's original order for relief. Determining that Rule 60(b) Fed.R.Civ.P. provided opportunities for relief which were not time barred, Legg first attempted such effort in 1988, erroneously filing his 60(b) motion before the district court as an appeal. His motion was denied for want of jurisdiction by the district court, and this was judgment later affirmed by the Fifth Circuit.

Since under *U.S. v. Lucchese*, 365 U.S. 290 (1961) and *Costello v. U.S.* 365 U.S. 265 (1961), it is the law of this Court that a ruling which cites want of jurisdiction as a basis for dismissal precludes a reviewing court from making any further judgment on the merits of the matter then pending, and such was the case with the previous appeal, Legg then properly filed his Rule 60(b) motion before the bankruptcy court citing a want of due process in the bankruptcy court's failure to hold a trial on the controverted involuntary petition, failure of jurisdiction in the bankruptcy court, and the bankruptcy court's erroneous reliance on the unverified agreed order allegedly signed by UMI's counsel in violation of Bankruptcy Rule 1008. Legg further cited the substantive law of Texas holding that an attorney cannot compromise his client's claim or defense without the express written authority of said client, and that any order based upon such a compromise is void. The bankruptcy court ignored Legg's Texas authorities, as well as the application of Bankruptcy Rule 1008, stating that it relied upon the attorney's "ostensible authority." Said court also stated that its ruling in a subsequently held adversary proceeding had found that UMI "defrauded its major creditor," even though said creditor was not a party to, nor were its claims at issue in, said adversary proceeding. Legg appealed this ruling to the district court.

The district court below refused to consider the merits, asserting res judicata with the previous appeal, though said court's ruling in Legg's previous procedurally flawed effort was plainly dismissed on its face for want of jurisdiction, and thus not a bar to subsequent consideration on the merits. The district court further refused to consider Legg's challenge to the constitutionality of 11 U.S.C. § 303.

The Fifth Circuit in essence rejected the district court's claim of res judicata and proceeded to consideration of the

merits of Legg's Rule 60(b) motion, and further addressed the constitutional, jurisdictional and due process issues raised in the case below.

The Fifth Circuit rejected Legg's evidence that UMI's counsel had defrauded both him and the court, relying on yet another unverified handwritten document allegedly signed by the suspect counsel over three years after the entry of the order for relief which was procured by the trustee in anticipation of Legg's challenge to said order. Said document was never properly introduced in the proceeding below. The Fifth Circuit inferred that Legg was not ignorant of, or had passively accepted, the bankruptcy proceeding, and that such conduct constituted a waiver of objection to the unverified agreed order. The record belies such an inference. Though perhaps misguided, Legg's efforts were assiduous in attempting to gain the ear of an impartial forum.

The court of appeals further denied Legg's assertion that the failure to determine the nature of the disputed claims in a trial on the controverted involuntary petition deprived the bankruptcy court of jurisdiction to enter the order for relief. The court of appeals cited *In re Rubin*, (9th Circuit 1985) 769 F.2d 611, in holding that 11 U.S.C. § 303 confers exclusive jurisdiction upon the bankruptcy court, and actual and constructive possession over the debtor and debtor's property, in all cases under title 11, and that such exclusive jurisdiction and actual or constructive possession exists prior to determination of the nature of the disputed claims, and arises upon the initial filing. *See* also 28 U.S.C § 157(a) & (b)(1) and 28 U.S.C. § 1334(a),(b) & (d). The court of appeals also held that there was no need for a trial on the controverted involuntary petition as mandated in 11 U.S.C. § 303(h) and that the nature of the alleged petitioning claims, i.e., as disputed or contingent, was

irrelevant to the entry of the order for relief.

Legg asserted that 11 U.S.C. § 303 is unconstitutional in that it arbitrarily and capriciously deprives a party of his "non-debtor" status and all protected property rights and liberties related thereto without due process of law, immediately upon the filing of an involuntary pleading. The court of appeals considered and responded to the constitutional challenges raised by Legg stating that 11 U.S.C. § 303 was not unconstitutional and that creditors had a "public right" to avail themselves of the bankruptcy process.

REASONS FOR GRANTING THE WRIT

A federal appeals court has held that alleged creditors have a "public right" to invoke the jurisdiction of Article I bankruptcy courts by the mere filing of a pleading pursuant to 11 U.S.C.§ 303. Through this transparent artifice, actions at law are presented for disposition to administrative equity tribunals; the legal status and stigma of a "debtor" is arbitrarily imposed without due process of law; a blatant opportunity for forum shopping arises, and the judicial power and authority of Article III courts are encroached upon. The Court should grant certiorari to review, and to eventually repudiate a decision radically at odds with the Court's holdings in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), decisions which focus on the essential constitutional limitations imposed upon the authority of Congress to enact laws on the subject of bankruptcies.

First, through the statutory provisions of 11 U.S.C. § 303, an alleged creditor invokes, and imposes the Article I equitable jurisdiction of the bankruptcy courts upon an

unwilling litigant, whose legal status is by virtue of no more than the pleading transformed from a "non-debtor" to "debtor." Upon filing of the pleading exclusive jurisdiction over the "debtor," and actual or constructive possession over the "debtor's property" is immediate. *In re Rubin*, *supra*. This is per se a total and absolute denial of due process of law. The resultant loss of property rights is immediate. Property of the litigant becomes "debtor's property," and the actual or constructive possession of the "debtor's property" by the bankruptcy court constitutes, at the very minimum, an unwarranted governmental intrusion into the private rights of ownership, as well as government encroachment upon the guaranteed liberty to conduct one's business without such interference.

It has been recognized that "upon the filing of the involuntary, the business of the debtor grinds to a halt." *Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess. 1 (1973), at 189. The present case illustrates that subsequent cosmetic amendments have not solved the problem. Due process is absent; deprivation of property and liberty is immediate, substantial and irremediable. It is essential that this Court address, and eventually remedy, this arbitrary and capricious deprivation.

Second, bankruptcy jurisdiction is dependent upon the existence of a debtor, which gives rise to the existence of the "estate," or property of the debtor. Without these crucial elements, there is no res over which the bankruptcy court may exercise jurisdiction. An involuntary pleading, which proffers no more than a rebuttable presumption, cannot create the res essential to invoke the jurisdiction of the bankruptcy court. To give any pleading such effect is to abrogate fundamental principles of due process of law.

Since an involuntary petition cannot create a "debtor," nor create the res over which the bankruptcy court may exercise jurisdiction, it is impossible to denote the relief sought in such a pleading as equitable. The nature of such a pleading can be nothing more, and nothing less, than an action at law. The case below is a perfect example of legal causes of action pled to a court of equity. To permit this transparent facade, with its attendant denial of due process guarantees of the Fifth Amendment, is to allow encroachment upon the judicial powers of Article III courts.

Third, in order for federal subject matter jurisdiction to attach based solely upon a party's status as an entity of federal creation, the act conferring exclusive federal jurisdiction must clearly define the rights and obligations of the entity. *U.S. v. Union Pacific R.R. Co.*, 98 U.S. 569 (1879); *VerLinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983). 11 U.S.C.§ 303 fails this test and is void for vagueness. The vague definitions of "debtor," "creditor," "debt" and "claim" under 11 U.S.C. § 101 create an opportunity for an entity with an unmatured, and/or contingent, and/or disputed, and/or liquidated "claim" to assume the status of a federally created entity and invoke the exclusive jurisdiction of the federal courts. No rights or obligations of the entity are defined in the statute conferring exclusive federal jurisdiction.

This fatal deficiency is not overcome by proving or disproving substantive issues such as the existence of a "bona fide dispute" under 11 U.S.C. § 303(b)(1) & (h)(1) and that debts are being "generally paid" as such debts become due and payable under 11 U.S.C. § 303(h)(1). Exclusive federal jurisdiction has attached based solely upon the entity's federal creation. By virtue of 28 U.S.C. § 157, such exclusive jurisdiction is conferred upon the

adjunct federal bankruptcy courts. The "respondent entity" has been by federal creation made a "debtor" under 11 U.S.C. § 303(g), (h), (i) & (j) and must submit and respond to the jurisdiction of an Article I court.

As the cited definitions allow a "disputed," "contingent" or "liquidated" claimant to assume the status of a federally created entity and invoke the jurisdiction of the federal courts, a "rule or standard so vague as really to be no rule or standard at all" is created and the result is to "strip a participant of his rights" sufficiently to invoke the "void for vagueness" doctrine and its due process guarantees. *Boutilier v. Immigration Service*, 387 U.S. 118, 123 (1967).

The vague and contradictory provisions of 11 U.S.C. § 303 are devoid of the guidance necessary to enable one to avoid the applicability of the law. The language of 11 U.S.C. § 303 supports the presumption that Congress intended to create a retrospective law that creates new rights in one party to the suit at the expense, or by an invasion of the rights, of other parties. This is an invalid and unconstitutional exercise of legislative power, and such should be addressed by this court. *U.S. V. Union Pacific R.R. Co., supra* at 607-608.

Fourth, no "public right" exists for a creditor to avoid and evade due process guarantees and to present legal claims, such as the breach of contract and damages claims at bar, to an Article I equitable tribunal. Despite its seductive and misleading nomenclature, involuntary bankruptcies are neither an integral, nor closely intertwined component of the bankruptcy process. For nearly all of the last decade, involuntary bankruptcy filings constituted less than one half of one per cent of all bankruptcy filings. *See Annual Reports of the Director of the Administrative of the United States Courts* (1987). They are an aberration, and a

dangerous and noxious opportunity for forum shopping.

Fifth, 11 U.S.C § 303(h) mandates a "trial" on a controverted involuntary petition. Below, the bankruptcy court failed to conduct such a trial, instead relying on an unverified agreed order entered without express written authority to do so. No meaningful hearing was held on the substantive disputed issues necessary for the retention of any lawful jurisdiction the bankruptcy court might have validly held. In the event this Court does not choose to address the constitutional validity of 11 U.S.C. § 303, this Court should grant certiorari to decide if an order for relief entered in such manner is void for want of due process of law.

Sixth, a related issue also demands this Court's review. Bankruptcy Rule 1008 requires verification of pleadings that compromise controversies in bankruptcy proceedings. As a statute duly enacted by Congress, its language is plain and unambiguous, its intent self-evident. Additionally, the substantive law of the State of Texas, *See Noska v. Mills*, (CA 1940), 141 S.W.2d 429, which must be applied by the federal courts under the doctrine of *Erie R.R. v. Thompkins*, 304 U.S. 63 (1938), provides that an attorney cannot without "express authority" compromise his client's claim or defense, and that any such effort is void, as is any judgment based upon it. Under Texas law, the only person having the authority to compromise UMI's claims or defenses in writing was its sole officer and director, Petitioner Legg, *not* attorney Unger. The record below shows an agreed order, unverified on its face and in violation of bankruptcy law, entered under unusual and suspect circumstances, which compromised UMI's defenses without express authority or signature by a corporate officer in violation of Texas state substantive law. Such conduct by an officer of the court, and acceptance by the

bankruptcy court itself should be reviewed, and ultimately repudiated, by this Court.

The case below is a disturbing example of the extremes to which the abuses of 11 U.S.C. § 303 can be carried. Though the facts presented are useful for the purpose, the questions presented are neither fact specific nor dependent upon development of evidence for resolution. Moreover, there is no reasonable likelihood that deferring consideration of the issues to a later day might cast them in a new, less perplexing light than that in which they appear in the present case. Nor should it be overlooked that few parties abused by the involuntary process will have the resources or the stamina to pursue appellate remedies to this Court. Since the Fifth Circuit ruled on the constitutional, jurisdictional and due process issues, as well as upon the merits of Petitioner's case, there is no impediment to this Court granting certiorari to review the questions presented.

Finally, the questions presented are of profound national significance, far transcending "the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, Inc., 349 U.S. 70, 74 (1955). The power of the United States Congress to enact uniform laws on bankruptcies is subject and subservient to certain inalienable constitutional guarantees of due process and adjudication of legal matters by courts with the essential attributes of judicial power. This Court must be ever vigilant, and prepared to combat encroachment upon these inalienable rights. These are important questions of federal law which have not been, but should be, settled by this Court. Supreme Court Rules 10.1 (a) & (c).

CONCLUSION

For the foregoing reasons, Petitioner R. David Legg asks that his petition for certiorari be granted.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. **91-2397**
Summary Calendar

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,

Debtor.

R. DAVID LEGG,
Appellant,

versus

UNITED MARKETS INTERNATIONAL, INC.,
Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-90-0716)

(Filed June 30, 1992)

Before **GARWOOD, HIGGINBOTHAM** and **BARKSDALE, Circuit Judges.***

* Local rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

GARWOOD, Circuit Judge:

Appellant R. David Legg (Legg) appeals the district court's affirmance of a bankruptcy court's denial of his Fed.R.Civ.P. 60(b) motion challenging the order for relief entered against Legg's company, United Markets International, Inc. (UMI). He further appeals the district court's denial of his motions to supplement the appellate record. Finding each of Legg's challenges to the bankruptcy court's and district court's judgments either untimely or meritless, we affirm.

Facts and Proceedings Below

Legg formed UMI, a Texas Corporation of which he was the sole shareholder, in 1982 primarily for the purpose of servicing a contract for the purchase and export of equipment to a Saudi Arabian construction joint venture, the Obaid and Almulla Construction Co. (OBALCO). On February 7, 1985, OBALCO terminated the contact, alleging breach by UMI, and filed an involuntary petition in bankruptcy court against UMI.

UMI retained counsel by the name of David Unger (Unger), an experienced bankruptcy attorney. Unger filed an answer to the petition asserting contractual and other defenses to OBALCO's petition. At a preliminary hearing on February 27, 1985, an interim trustee was appointed to oversee UMI and an expedited hearing on the involuntary

hearing was scheduled for March 28, 1985. At the direction of Unger, Legg was not present at the February 27 hearing.

On March 28, 1985, counsel for the bankruptcy petitioners presented the bankruptcy court with a Consent to Entry of Order for Relief (the Consent) executed by Unger on behalf of UMI. The bankruptcy court thereupon entered an Order for Relief and Appointment of a Trustee dated March 28, 1985 (the Order), without trial or hearing and placed UMI into bankruptcy. The Order also included a mandate that the interim trustee, appellee W. Steve Smith (Smith), continue in control of UMI as trustee. Neither Legg nor his personal counsel (whom Legg had retained after the preliminary hearing) was present at this hearing despite having received a letter from Unger specifying the date, time, and place of the hearing. Unger was also not present at the hearing, having tendered the Consent to petitioner's counsel earlier that morning. Legg claims that he did not know that Unger had executed the Consent and that he was not notified after the hearing, and did not suspect, that the Order had been entered by the bankruptcy court.

For two years thereafter, Smith, as trustee for UMI, represented the bankruptcy estate and attempted to marshall and then sell the assets of the estate in order to pay UMI's creditors. Smith filed several actions against Legg for the return of property (including a high-rise condominium and sports car) in Legg's possession that had been bought with UMI funds. Legg knew of, and contested, these actions. Legg also filed his own lawsuits against the petitioning creditors and against Smith in the months following the entry of the Order.

Legg claims that he did not discover the Consent and

Order until the summer of 1986 while going through the UMI bankruptcy files with his personal counsel. The present action began on May 5, 1988, when Legg filed an appeal with the district court (styled as a motion under Fed.R.Civ.P. 60(b)) of the Order. The motion alleged, *inter alia*, that the bankruptcy court lacked jurisdiction to enter the Order, and that Unger had perpetrated a fraud on the court by signing the Consent without authorization from Legg. The district court addressed the merits of Legg's claims, but dismissed the motion for lack of jurisdiction in an order dated July 7, 1988.

Legg appealed the district court's decision to this Court. In an unpublished opinion dated December 2, 1988, this Court affirmed the district court's dismissal for lack of jurisdiction, but also noted the lack of merit of Legg's claims.

Legg then returned to the bankruptcy court and on October 23, 1989, filed another motion under Rule 60(b) requesting that the bankruptcy court vacate the Order. The bankruptcy court denied this motion on December 11, 1989. Legg then appealed the denial of this motion to the district court, which affirmed the bankruptcy court on September 27, 1990, citing *res judicata* as grounds for its decision. Legg filed a motion for reconsideration, which the district court denied on March 13, 1991. Legg then brought the present appeal to this Court.

Discussion[1]

A. Bankruptcy court jurisdiction

Legg first challenges the jurisdiction of the bankruptcy court to enter the Order. Legg claims that because the bankruptcy court did not hold a hearing or trial to determine whether (i) OBALCO had a bona fide and undisputed claim against UMI and (ii) UMI was generally not paying its debts as they became due, the bankruptcy court surrendered its jurisdiction over UMI before entering the Order.

Legg mistakes jurisdictional analysis for an inquiry into the merits. Analysis of bankruptcy court jurisdiction in a particular action involves a two-step process. *Matter of Majestic Energy Corp.*, 835 F.2d 87, 90 (5th Cir. 1988). First, whether federal jurisdiction over the case exists is determined pursuant to 28 U.S.C. § 1334(a), which provides that "the district court shall have original and exclusive jurisdiction of all cases under title 11."

The second step, if jurisdiction is found pursuant to section 1334, is to examine 28 U.S.C. § 157 to determine whether the proceeding is one that the bankruptcy court may adjudicate. *Majestic Energy, supra*, at 835 F.2d at 90. Section 157(b)(1) states, in relevant part, that "[b]ankruptcy

[1]The district court appears to have affirmed the bankruptcy court's denial of Legg's Rule 60(b) motion on grounds of *res judicata* because of the prior procedural history of this case. We, however, choose to address the merits of Legg's claims. This Court is not restricted to the reasons given by the district court for its ruling on the Rule 60(b) motion and will affirm if the judgment of the district court is correct. *Murray v. Ford Motor Co.*, 770 F.2d 461, 462 (5th Cir. 1985). Consequently, we will not address Legg's arguments that the district court erroneously applied *res judicata* principles to his latest appeal before that court.

judges may hear and determine all cases under title 11...and may enter appropriate orders and judgments, subject to review under section 158 of this title."

An involuntary bankruptcy petition is filed under section 303 of the Bankruptcy Code, 11 U.S.C. § 303. Section 303 sets forth the procedure and criteria by which the bankruptcy court evaluates an involuntary petition, up to and including the entry of an order for relief. Therefore, the entry of the Order was clearly a "case[] under title 11" to which 28 U.S.C. §§ 1334(a) and 157(b)(1) granted the bankruptcy court jurisdiction and the power to adjudicate. The requirements enunciated in section 303 of the bankruptcy code for filing an involuntary petition are substantive and procedural, not jurisdictional. *In re Rubin*, 769 F.2d 611, 614 (9th Cir. 1985).

In *Rubin*, also an involuntary petition case, the bankruptcy court entered an order striking the debtor's answer to the involuntary petition and then entered an order for relief. The debtor claimed that the bankruptcy court lacked jurisdiction to enter the order for relief because it had not determined that the claims of the petitioners were "undisputed" as required by the Bankruptcy Amendments and Federal Judgeship Act of 1984, which inserted this requirement in section 303. The Ninth Circuit determined that the undisputed claims requirement went to the merits of the bankruptcy court's decision to enter the order for relief, but was not jurisdictional. The *Rubin* court stated that: "Petitioning creditors cannot prevail unless they show that their claims are not subject to bona fide disputes, but the bankruptcy court is not without jurisdiction prior to this determination." *Id.* at 615. *Cf. Archie v. Christian*, 808 F.2d 1132, 1134-35 (5th Cir. 1987) (en banc) (trial before magistrate, through procedurally improper, did not deprive

the district court of jurisdiction to enter judgment).

We believe the same analysis applies to Legg's claims. Section 303(h)'s requirement that a trial be held for contested involuntary petitions is procedural, not jurisdictional. Further, Bankruptcy Rule 1008's requirement that certain documents contain a verification or unsworn declaration is similarly a non-jurisdictional requirement. *Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 366 (5th Cir. 1962). Therefore, Legg's claim that the Order is void for lack of jurisdiction is incorrect. The bankruptcy court clearly had jurisdiction to enter the Order.

B. The validity of the Consent and Order

Most of Legg's claims turn on the factual matter of whether UMI's attorney Unger fraudulently provided the Consent that formed the basis of the Order. In its order denying Legg's Rule 60(b) motion, the bankruptcy court found that:

> "The order [for relief] was consented to at the trial on the involuntary petition. Had the Order not been consented to the matter would have been tried at the time, as it had been noticed for trial and special time had been set aside for it. If Unger did not have actual authority to consent he had ostensible authority...."

Thus, the bankruptcy court found that Unger had not, in fact, defrauded the bankruptcy court or Legg in tendering the Consent. This Court reviews factual determinations made by the bankruptcy court only for clear error. *In re Sutton*, 904 F.2d 327, 329 (5th Cir. 1990); Bankr. Proc. R.

8013. Because the determination that Unger had not defrauded the court is a factual one, it is entitled to this deferential standard.

The record contains an affidavit executed by Unger claiming that he notified Legg that because other creditors had joined the involuntary petition, it could no longer be opposed in good faith and that Legg "unequivocally acquiesced in the entry of an order for relief against UMI, and authorized me to consent in writing thereto." Though Legg has submitted the affidavits of his personal attorneys and Unger's billing records in an attempt to establish the factual impossibility of Unger's statements, upon careful review of the evidence in the record as a whole, including that below-referenced, we are unable to say that the bankruptcy court was clearly erroneous in failing to credit Legg's fraud claim.[2]

[2] Legg additionally claims that the district court erred by refusing to hold an evidentiary hearing to determine whether Unger had authority to execute the Consent. Legg claims this hearing was needed so that he could present witness testimony, cross-examine Unger and his associates, and argue his documentary evidence to the district court.

We review a district court's denial of an evidentiary hearing for abuse of discretion. *United States v. Chagra*, 735 F.2d 870, 873 (5th Cir. 1984). Here, Legg submitted the affidavits of his personal attorneys and Unger's billing records to support his written arguments that Unger had executed the Consent without Legg's authorization. Unger's affidavit was also in the record. Legg presents no specifics in his brief as to what witnesses he would have called before the district court or what the substance of their testimony would have been. Though Legg might presumably have wished to cross-examine Unger, the record suggests that Unger was not within the jurisdiction of the court at that time and could not have been compelled to appear.

Having concluded that the district court had sufficient evidence before it to support its factual finding that Legg had authorized the Consent executed by Unger, we also find that the district court did not abuse its discretion in declining to hold an evidentiary hearing on the matter.

Additionally, Legg argues that the Consent was invalid because it did not comply with Bankruptcy Rule 1008, which required that : "All petitions, lists, schedules, statements of financial affairs, statements of executory contracts, Chapter 13 Statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746." Legg contends that this defect renders the resulting Order void.

An error in verification, or the lack thereof, is not a jurisdictional defect and can be cured or waived. *See Georgia Jewelers, Inc. v. Bulova Watch Co.*, 302 F.2d 362, 366 (5th Cir. 1962); *In re Royal Circle of Friends Bldg. Corp.*, 159 F.2d 539, 541 (7th Cir. 1947). Here, Legg clearly waived any defect in verification. We have already determined that Legg authorized Unger to give the consent to relief. Moreover, on the record before this court, we find Legg's contention that he did not know of the Consent and Order until more than one year after the fact to be totally incredible. Trustee Smith, acting openly in his capacity as such, vigorously pursued the return of UMI-owned assets in Legg's possession during the time that legg claims he was ignorant of the fact that UMI was in bankruptcy. During that same time, Legg filed numerous actions against the creditors of UMI and for removal of Smith as trustee of UMI. We can imagine no plausible set of facts in which Legg could have been so intimately involved with UMI's post-petition affairs and have been unaware that the company was in bankruptcy proceedings. By pursuing this offensive and defensive litigation while UMI was in bankruptcy proceedings, Legg waived any defect in verification in the Consent that might have tainted the Order.

Further, even if Legg had not discovered the Consent and Order earlier, by his own admission he did so no later than the summer of 1986. He then failed to allege any verification defect in the Consent until May 5, 1988. During that two-year period, trustee Smith continued to marshal UMI assets and arrange for the payment of UMI's creditors.

To lay all those actions to waste at this point would be unconscionably prejudicial to UMI and its creditors.

Laches will bar a claim where (i) there was a delay in asserting a right or claim, (ii) that delay was inexcusable, and (iii) undue prejudice resulted from the delay. *Armco, Inc. v. Armco Burglar Alarm Co., Inc.*, 693 F.2d 1161 (5th Cir. 1982). As the preceding paragraphs show, these three elements were clearly present by the time Legg first asserted this claim in 1988. Thus, Legg was barred by the doctrine of laches from attempting to avoid the Order.

Having disposed of these attacks on the validity of the Consent and the resulting Order, we briefly address the balance of Legg's claims.

C. Fraud allegations

Legg contends that Unger's fraudulent Consent constituted "fraud on the court" and therefore the resulting Order should have been vacated by the bankruptcy court pursuant to Rule 60(b)(6). *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978). Because we determined that there was no reversible error in the determination that no such fraud was shown in the Consent or in the hearing on the involuntary petition, however, this claim is stripped of its factual underpinning and rendered meritless. Nor do we consider that a mistake

or misunderstanding (if any) by Unger as to his authority would constitute fraud for purposes of the *Rozier* rule. Even if Unger's actions rose to Rule 60(b)(3) fraud or misconduct, Legg did not file his motion within the applicable one-year time limit.

D. Due process claim

Legg further claims that the Order should have been set aside as a "void order" under Rule (b)(4). Though his brief is unclear, Legg seems to argue that the Order is void on three different grounds. First, Legg argues, the Order was void because the bankruptcy court was without jurisdiction to issue it. Legg further argues that the Order was void because it was entered as a result of Unger's fraudulent Consent. These arguments have been considered and rejected, *supra*. Legg argues further, however, that the Order was void because the bankruptcy court did not conduct a trial as specified in section 303 of the Bankruptcy Code.

Bankruptcy Code section 303(h) states, in relevant part:

> "If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition is filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if-
>
> (1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute...."

Legg argues that because Unger had earlier filed an answer challenging the involuntary petition, the petition

was "timely controverted" and thus a trial was required. By entering the order for relief without first conducting a trial, Legg contends, the bankruptcy judge committed a procedural error that deprived Legg of his due process rights and resulted in a void Order.

This argument is plainly illogical. The very point of the trial contemplated by section 303(h) is to determine whether the alleged debtor is generally not paying its debts as they become due and that the other prerequisites (number of creditors, undisputed claims, etc). have been established. Once the alleged debtor has entered a stipulation or consent that all these prerequisites have been met and that an order for relief should be entered, there is nothing left to try. The case is no longer "timely contested" and the swift entry of an order for relief without further hearing is appropriate. *See 2 Collier on Bankruptcy* ¶ 303.25 (15th ed. 1992); *In re Liberal Mack Sales, Inc.*, 24 B.R. 707 (Bankr. Kan. 1982). The Order is not void due to any procedural infirmity and therefore the bankruptcy court was correct in refusing to set aside the Order on Rule 60(b)(4) grounds.

E. The constitutionality of section 303

Legg next contends that the Bankruptcy Code section 303, 11 U.S.C. § 303, is unconstitutional because it allows the adjudication of "private rights" by non-Article III bankruptcy courts, a situation that the Supreme court has declared unconstitutional in decisions such as *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858 (1982), and *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989). We do not believe, however, that section 303 presents the same problem that concerned the Supreme Court in those decisions.

The Supreme Court has recognized that so-called "public rights," those created by acts of Congress, may be adjudicated by non-Article III tribunals. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856). Unlike the state law breach of contract and misrepresentation claims at issue in *Northern Pipeline* and the fraudulent conveyance claims in *Granfinanciera*, the adjudication prescribed by section 303 involves whether creditors can avail themselves of the protection of the bankruptcy laws. This is inherently a public right.

Contrary to Legg's argument, a bankruptcy court adjudicating an involuntary petition pursuant to section 303 is not deciding contract or other private claims such as those Legg alleged against OBALCO. By the clear terms of section 303, to sustain an involuntary petition the claims asserted by the creditors must be "undisputed." Thus, the bankruptcy court takes no part in adjudicating those claims that are disputed, but must disallow them for the purposes of establishing the validity of the involuntary petition. The only adjudication made by the bankruptcy court in this action was whether UMI was generally paying its debts as they became due. There is no constitutional infirmity in a bankruptcy court making such a determination. We therefore reject Legg's constitutional challenge to section 303.

F. The motions to supplement the record

Legg also challenges the district court's denial in part of his motions to supplement the record of this case with (i) a letter from OBALCO to its counsel, and (ii) a series of newspaper articles. Legg contends that these materials were necessary additions to the appellate record, which would further develop Legg's allegations of fraud in this case.

While our attention has not been directed to any case in this Circuit expressly addressing the standard of review to be applied by the Court of Appeals to a district court's denial of a motion to supplement an appellate record, we conclude that the appropriate standard would be no more favorable to Legg than that applied in this Court's recent decision in *Fields v. City of South Houston*, 922 F.2d 1183 (5th Cir. 1991). *Fields* addressed the situation in which a losing party seeking reconsideration of a grant of summary judgment attempts to supplement the summary judgment record with evidence not previously submitted. This Court stated in *Fields* that "[i]f the party seeking reconsideration submits additional materials, the trial court may consider those materials in its discretion." *Id.* at 1188. "[I]f the district court refuses to consider the materials, the reviewing court applies the abuse of discretion standard." Id.

A district court considering an appeal from a bankruptcy court bases its decision on a documentary record submitted by the parties and the bankruptcy court. Similarly, a district court considering a summary judgment motion bases its decision on a documentary record submitted by the parties. Both decisions are subject to standards that guide the court's analysis of the record in reaching its decision. Thus, in both cases the district court must also decide the sufficiency of the existing record and the impact of any further information offered by a party. As the district court is an appellate court in the present situation, the standard of review of its actions should certainly be no less deferential than when it acts entirely as a court of first instance.

Consequently, Legg is entitled, at best, to an abuse of discretion standard of review of the district court's refusal to supplement the record in the two particulars named

above. We conclude that there has been no abuse of discretion in denying Legg's motion to supplement. Legg has misinterpreted the letter from OBALCO to its counsel. While Legg claims that the letter reveals that OBALCO knew it had based its involuntary petition on a disputed claim and wished to withdraw that claim, the letter in fact evidences OBALCO's displeasure at its counsel's withdrawal from representation of OBALCO. Thus, the letter has no relevance to Legg's case.

The newspaper articles are similarly unhelpful. Legg claims that they document a situation of rampant fraud and collusion in the Houston bankruptcy system that bolsters his own allegations of fraud. Whatever the merit of the articles, however, they have absolutely no bearing on Legg's claims of fraud in this particular case. In fact, the only portions of the articles specific to Legg's case are the result of an interview Legg gave to the author of the series of articles. The information contained in the articles is thus either cumulative or irrelevant, and at any rate is not reliable evidence. The district court did not abuse its discretion in denying Legg's motions to supplement the record with this evidence.

G. Other claims

Legg's brief on appeal is replete with undeveloped arguments for claims other than those addressed above. None demonstrate either legal or factual merit and we reject them.

Conclusion

For the foregoing reasons, we affirm the bankruptcy court's denial of Legg's Fed.R.Civ.P. 60(b) motion and the district court's denial of Legg's motions to supplement the appellate record.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. **91-2397**

IN THE MATTER OF:
UNITED MARKETS INTERNATION, INC.,

Debtor.

R. DAVID LEGG,
Appellant,

versus

UNITED MARKETS INTERNATIONAL, INC.,
Appellee.

Appeal from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(AUGUST 10, 1992)

Before **GARWOOD, HIGGINBOTHAM** and **BARKSDALE, Circuit Judges.**

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ **WILL GARWOOD**
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:
UNITED MARKETS INTERNATIONAL, INC.

CASE NO. 85-000872-H2-5
CHAPTER 11

(Entered December 15, 1989)

NOTICE

Hearing on Movant R. David Legg's Motion to Vacate Void Order pursuant to Rule 60(b) Fed.R.Civ.P. shall be heard on the __ day of _____, 19__, at _:__ o'clock _.m. in Courtroom ___, before the Honorable Judge _____.

SIGNED this __ day of _____, 19__.

_____

December 11, 1989

THE "MOTION TO VACATE VOID ORDER" IS DENIED. THE ORDER FOR RELIEF IS NOT VOID. THE ORDER WAS CONSENTED TO AT THE TRIAL ON THE INVOLUNTARY PETITION. HAD THE ORDER NOT BEEN CONSENTED TO THE MATTER WOULD HAVE BEEN TRIED AT THAT TIME, AS IT HAD BEEN NOTICED FOR TRIAL AND SPECIAL TIME HAD BEEN SET ASIDE FOR IT. IF UNGER DID NOT HAVE ACTUAL AUTHORITY TO

CONSENT HE HAD OSTENSIBLE AUTHORITY. THE DEBTOR IS ESTOPPED TO RAISE THIS ISSUE AT THIS TIME. THE COURT HEARD EVIDENCE IN A RELATED ADVERSARY IN WHICH THE ESSENCE OF THE COURT'S FINDING WERE THAT THE DEBTOR HAD DEFRAUDED ITS MAJOR CREDITOR AND COULD NOT REPAY SUCH DEBT, WHICH HAD MATURED. THIS MOTION HAS NO MERIT.

/s/ R.F. WHELESS, JR..

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-90-716

DAVID LEGG,
PLAINTIFF

VS.

UNITED MARKET INTERNATIONAL, INC.,
DEFENDANT

(Entered October 4, 1991)

ORDER

The Order of the Bankruptcy Court denying Appellant's Rule 60(b) motion is affirmed.

David R. Legg, president of Market International, Inc., ("MCI") is appealing an order of the Bankruptcy Court. On March 28, 1985, the Bankruptcy Court entered an order for relief from an involuntary bankruptcy petition and designated Steve Smith as trustee for the company. David Unger, MCI's attorney at the time of the involuntary petition, had agreed to the terms of the order.

In May 1987, Legg, unsatisfied with the Bankruptcy Court's ruling and with Unger's actions, filed a Rule 60(b) motion in the *District Court* to attack the Bankruptcy Court's order for relief. Legg argued that the Bankruptcy Court lacked jurisdiction to enter the order of relief and

that Unger lacked authority to consent to the order. In addition, Legg argued that the actions constituted fraud on the Court.

This Court dismissed Legg's appeal holding that the Bankruptcy Court had jurisdiction over the case; that a valid order had been issued in 1985; that laches and estoppel barred Legg's appeal and that the appeal was not timely.

The Fifth Circuit affirmed the District Court's holding and admonished Legg to refrain from further attempts to escape the Bankruptcy Court's order in the following language:

> We also observe that Legg's arguments supporting his belated appeal to the district court are so obviously without merit that we must warn him of the possibility that sanctions may be incurred if he pursues the filing of further frivolous pleadings or appeals in this Court.

Undeterred by this Court's warning, Legg filed a Motion to Vacate Void Order under Rule 60(b) again, but this time in the *Bankruptcy Court*. Legg was thus trying to bring his appeal of the 1985 order in the proper forum. The Bankruptcy Court dismissed his appeal, denied Legg's motion for reconsideration, and affirmed the validity of the 1985 order.

Legg's present appeal to the District Court contains essentially the same arguments as those previously raised before this Court. Legg's arguments now have one more wrinkle. Legg contends that, because his Rule 60(b) motion is the proper procedural attack on the 1985 order and the Bankruptcy Court refused to allow an adversary

hearing on the validity of that order, his appeal is now properly before the District Court.

While applauding Legg's creativity, the Court finds no merit to his argument. This Court now affirms the Bankruptcy Court's 1985 order once again and denies Appellant's motion for summary judgment. In addition, in light of the Fifth Circuit's admonishment and the history of the case, the Court finds that Legg's second attempted appeal is frivolous. It is further

ORDERED that Appellant's Motion to Strike is DENIED. It is further

ORDERED that Appellant's Original Motion to Supplement the Record is GRANTED with regard to all items listed on pages 2 & 3 of the motion. The Motion is DENIED with regard to item #2 on page 4 of the motion, the letter from Hutcheson & Grundy. It is further

ORDERED that Appellant's Second Motion to Supplement is GRANTED with regard to item #1, a copy of the transcript of a Preliminary Hearing in the Bankruptcy case, and the motion is DENIED with regard to item #2, the series of newspaper articles.

Signed this 27th day of September, 1990 at Houston, Texas.

/s/ NORMAN W. BLACK
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 85-000872-H2-5
CHAPTER 11

IN RE:
UNITED MARKETS INTERNATIONAL, INC.

(Entered January 29, 1990)

ORDER

CAME ON R. DAVID LEGG'S Motion for Reconsideration of this Court's dismissal of his Motion to Vacate Void Order, and the Court, after consideration does hereby GRANT said Motion for Reconsideration. A hearing on Movant's Motion to Vacate Void Order for Relief pursuant to Rule 60(b) Fed.R.Civ.P. shall be heard on the __ day of _____, 19__, at _:__ o'clock _.m.

SIGNED this __ day of _____, 19__.

_____
UNITED STATES BANKRUPTCY JUDGE

January 20, 1990

Motion DENIED ON SAME BASIS AS Docket entry 248 of 12-15-89

/s/ **R.F. WHELESS, JR.**

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-90-716

DAVID LEGG,
PLAINTIFF

VS.

UNITED MARKET INTERNATIONAL, INC.,
DEFENDANT
(Entered March 15, 1991)

ORDER

On September 17, 1990, this Court affirmed the ruling of the bankruptcy court and denied Appellant's motion for summary judgment in the above styled case. This Court also requested that Legg refrain from reurging his appeal of the bankruptcy court order, which the Court has now heard on two occasions. In light of the above and the Fifth Circuit's warning that sanctions would be imposed for future filings, it is hereby

ORDERED that Appellant's motion for reconsideration (entry 25) is hereby DENIED. It is further

ORDERED that appellant's motion for leave of Court to file supplemental motion for reconsideration (entry 26) is DENIED.

Signed this 13th day of March, 1991 at Houston, Texas.

/s/ **NORMAN W. BLACK**
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 85-000872-H2-5
CHAPTER 11

IN RE:
UNITED MARKETS INTERNATIONAL, INC.
(Entered April 2, 1985)

ORDER FOR RELIEF AND APPOINTMENT OF A TRUSTEE

Came on for consideration the Involuntary Case: Creditors' Petition (the "Petition") filed on February 7, 1985, against the above-named Debtor, the Consent to Entry of Order for Relief and Appointment of a Trustee signed by United Markets International, Inc. ("UMI"), and there being sufficient grounds for the relief sought in the Petition, it is accordingly

ORDERED that an Order for Relief under Chapter 11 of Title 11 of the United States Code is hereby granted with repect to UMI, and it is further

ORDERED that W. Steve Smith be, and hereby is, continued as trustee of UMI, having been appointed as Trustee on February 27, 1985 by order of this Court pursuant to Section 1104 of the Bankruptcy Code.

DATED: **/s/ MARCH 28, 1985**.

/s/ R. F. WHELESS, JR.
UNITED STATES BANKRUPTCY JUDGE

APPENDIX H

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CASE NO. 85-000872-H2-5
CHAPTER 11

IN RE:
UNITED MARKETS INTERNATIONAL, INC.

CONSENT TO ENTRY OF ORDER FOR RELIEF AND APPOINTMENT OF A TRUSTEE

NOW COMES United Markets International, Inc. ("UMI"), which is the subject of the Involuntary Case: Creditors' Petition filed by Essam Obaid and Obaid and Almulla Construction Company, Ltd. and the Notices of Joinder filed by three unsecured creditors of UMI, and files this its Consent to Entry of Order for Relief and Appointment of a Trustee and would show the Court the following:

1. UMI admits that it is generally not paying its debts as they become due.

2. UMI consents to the entry of an Order for Relief and the Appointment of the Trustee in the form substantially conforming to the form attached hereto marked Exhibit "A."

WHEREFORE, UMI respectfully ~~requests~~ *consents /s/ D.U.* that the Court enter an order for relief and ~~appoint a~~ *continue W. Steve Smith as /s/ D.U.* trustee for UMI, and for such other and further relief as is just.

DATED: March 28, 1985.

Respectfully submitted,

LACKSHIN & NATHAN

/S/ DAVID C. UNGER
David C. Unger
2302 Fannin, Suite 500
Houston, Texas 77002
(713) 659-3222

ATTORNEYS FOR UNITED
MARKETS INTERNATIONAL, INC.

I certify that the foregoing is a true copy of the original now on file in the Bankruptcy Court Southern District of Texas.

By /s/ J.I. Quin, Clerk

APPENDIX I

RELEVANT PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AND AMENDMENTS THERETO, UNITED STATES CODE, FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF BANKRUPTCY PROCEDURE

THE CONSTITUTION OF THE UNITED STATES:

ARTICLE I

SECTION 1- All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

SECTION 8- (1) The Congress shall have the power--

* * *

(4) To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

* * *

(9) To constitute tribunals inferior to the Supreme Court;

* * *

(18) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the

government of the United States, or in any department or officer thereof.

* * *

ARTICLE III

SECTION 1- The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

SECTION 2- (1) The judicial power shall extend to all cases, in law and equity, arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;-to all cases affecting ambassadors, other public ministers and consuls;-to all cases of admiralty and maritime jurisdiction;-to controversies to which the United States shall be a party;-to controversies between two or more States;-between a State and citizens of another State;- between citizens of different States;- between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects.

(2) In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both of

law and fact, with such exceptions, and under such regulations as the Congress shall make.

* * *

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE PROVISIONS:

TITLE 11

SECTION **101** Definitions

In this title-

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(4) "claim" means-

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

* * *

(9) "creditor" means-

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim;

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(11) "debt" means liability on a claim;

(12) "debtor" means person or municipality concerning which a case under this title has been commenced;

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SECTION **303**. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title-

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such holder, if such claims aggregate at least $5000 more than the value of any lien on the property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 548, 549 or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5000 of such claims;

(3) if such person is a partnership-

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all the general partners in such partnership, by a general partner in such partnership, the trustee of such general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning the person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other

than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve property of the estate or to prevent loss to the estate, may appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of

such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if-

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment-

(1) against the petitioners and in favor of the debtor for-

(A) costs;

(B) a reasonable attorney's fee; or

(C) any damages proximately caused by the taking of possession of the debtor's property by a trustee appointed under subsection (g) of this section or section 1104 of this title; or

(2) against any petitioner that filed the petition in bad faith, for-

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section-

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k) Notwithstanding subsection (a) of this section, an involuntary case may be commenced against a foreign bank that is not engaged in such business in the United States only under chapter 7 of this title and only if a foreign proceeding concerning such bank is pending.

TITLE 28

JUDICIARY AND JUDICIAL PROCEDURE

SECTION 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under

title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate relief orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-

(A) matters concerning the administration of the estate;

* * *

SECTION 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

* * *

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

RULE 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud on the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

RULE 1008

VERIFICATION OF PETITIONS AND ACCOMPANYING PAPERS

All petitions, lists, schedules, statements of financial affairs, statements of executory contracts, Chapter 13 Statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S. § 1746.